TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908

No. 178

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED SEPTEMBER 28, 1908

(19,954.)

(19,254.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 603.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 1, 1904.



1 In the Court of Claims.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY Company
vs.
THE UNITED STATES. } No. 20462.

I.—*Petition and Amended Petition.*

The claimants' original petition was filed August 25, 1896.

To said petition the defendants filed their demurrer November 7, 1896.

On July 19, 1900 by leave of court the claimants filed an amended petition which is as follows:

Amended Petition.

Filed July 19, 1900.

To the honorable the chief-justice and judges of the Court of Claims:

Your petitioner, The Chicago, Milwaukee & St. Paul Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, by way of amended petition respectfully represents:

I.

That the Milwaukee and Northern Railroad Company, at the dates and times hereinafter mentioned, was a corporation of said
2 State of Wisconsin, and owned and operated the line of railroad hereinafter mentioned; that prior to the fourth day of February, 1890, it owned and operated a certain line of railroad extending from the city of Milwaukee, Wisconsin, to Republic, in the State of Michigan, a distance of 255.37 miles, and that on said last mentioned date, said line of road was extended and put in operation from said Republic to Champion, Michigan, a distance of 8.89 miles, making a total mileage of 264.26 miles.

That said line of railroad from Milwaukee to Republic had, prior to said fourth day of February, 1890, been designated by the postal authorities of the United States as postal route No. 139016, and said railroad company had been authorized by the Post Office Department to carry the United States mails thereon at such compensation as was, or might be, authorized by law and the practice of said department.

II.

That on said fourth day of February, 1890, the said railroad company having extended its line of railroad as aforesaid to said Champion, railway mail service was, by order of the Postmaster-General, on that date established and extended to said Champion from and

after February 24th, 1890, which order provided, among other things, that the rate of compensation would be adjusted in a subsequent order in accordance with law. That afterwards the said postal authorities caused the mails on said route from said Milwaukee to Champion, to be weighed for thirty successive working days, commencing September 23d, 1890, pursuant to statute in such
3 case made and provided, and the practice and usage of the Post Office Department, and thereupon, and on the first day of December, 1890, the Second Assistant Postmaster-General, under section 4002 of the Revised Statutes of the United States and the several acts amendatory thereof, and the rules, practice and custom of the Post Office Department, ordered that the compensation for the transportation of mails on route No. 139016, between Milwaukee and Champion, Michigan, be fixed from September 23d, 1890, to June 30th, 1891, at the rate of $35,022.37 per annum, being $132.53 per mile for 264.26 miles; and that from February 24th to September 22d, 1890, compensation should be allowed at the rate of $1,178.19 per annum, being $132.53 per mile for 8.89 miles extension from said Republic to Champion, Michigan; and on that date notified the said Milwaukee & Northern Railroad Company of the making of said order.

The petitioner avers that the said order of February 4th, 1890, so made by the Post Office Department, was in the words and figures following, to wit:

"From February 24th, 1890, extend service from Republic to Champion, Mich., increasing distance 9.16 miles, less 27/100 mile, terminal distance at Republic, making net increase 8.89 miles, in accordance with distance circular, and with the understanding that the rate of compensation on this extension will be adjusted in a subsequent order in accordance with the law."

And the petitioner avers that on the same day, to-wit, February 4th, 1890, the department issued to the Milwaukee & North-
4 ern Railroad Company a notice of which the following is a copy:

"Railway adjustment division.

Route No. 25016, from Milwaukee, Wis., to Republic, Mich.

Post Office Department, office of the Second Assistant Postmaster-General.

WASHINGTON, D. C., *Feb'y* 4, 1890.

SIR: An order, of which the following is a copy, has this day been made by the Postmaster-General:

'From February 24, 1890, extend service from Republic to Champion, Mich., increasing distance 9.16 miles, less 27/100 mile, terminal distance at Republic, making net increase 8.89 miles, in accordance with distance circular, and with the understanding that

the rate of compensation on this extension will be adjusted in a subsequent order in accordance with the law.'

Every railroad company is required to take the mails from and deliver them into all *terminal post offices whatever*, except in cities where other provision is made by the department, and also to all intermediate post offices which are located at not more than eighty rods from the nearest station or railroad office at which such company has an *agent*, the distance to be measured by the shortest road. The length of the route will be computed and paid for from terminal office to terminal office, as at present, except in those cities where the department causes the mail to be carried between the railroad and post office, and in such it will be computed from the place where the mail is taken from and delivered to the company. Under this regulation your company will be required to receive and deliver the mails at the following-named offices, as well as at all offices hereafter established within said limits:

Champion.

The department will provide for the carriage of mails to and from other intermediate post offices only. At all other points where mail trains do not make regular stops, the speed of trains carrying the mails must be slackened to admit the exchange of mails with safety.

The department will provide for service between the station and the following named offices:

Republic.

Very respectfully, S. A. WHITFIELD,
Second Ass't Postmaster-General.

Mr. C. F. Dutton, gen. mgr. Milwaukee & Northern R. R., Milwaukee, Wis."

That subsequently, to-wit, December 1st, 1890, the Post Office Department issued to the Milwaukee & Northern Railroad Company a notice of adjustment of pay, of which the following is a copy:

"(*Notice of Adjustment of Pay.*)

Railway adjustment division.

Route No. 139,016.

From Milwaukee, Wis., to Champion, Mich.

Post Office Department, office of the Second Assistant Postmaster-General.

WASHINGTON, D. C., *Dec.* 1, 1890.

SIR: The compensation for the transportation of mails, etc., on route No. 139,016, between Milwaukee, Wis., and Champion, Mich., has been fixed from Sept. 23, 1890, to June 30, 1891, (unless other-

wise ordered) under acts of March 3, 1873, July 12, 1876, and June 17, 1878, upon returns showing the amount and character of the service for thirty successive working days, commencing Sept. 23, 1890, at the rate of $35,022.37 per annum, being $132.53 per mile for 264.26 miles.

6 From February 24 to Sept. 22, 1890, pay is allowed at the rate of $1,178.19 per annum, being $132.53 per mile for 8.89 miles extension between Republic and Champion, Mich.

This adjustment is subject to future orders and to fines and deductions.

Very respectfully, L. LOWRIE BELL,
Second Ass't Postmaster-General.

Mr. C. F. Dutton, general manager, Milwaukee & Northern R. R. Milwaukee, Wisconsin."

And subsequently, to wit, December 3d, 1890, the Post Office Department issued another notice to the Milwaukee & Northern Railroad Company of which the following is a copy:

"(*Notice of Adjustment of Pay.*)

Railway adjustment division.

Route No. 139,016.

From Milwaukee, Wis., to Champion, Mich.

Post Office Department, office of the Second Assistant Postmaster General.

WASHINGTON, D. C., *Dec'r* 3, 1890.

SIR: The compensation for the transportation of mails, etc., on route No. 139,016, between Republic and Champion, Mich., has been fixed from February 24, 1890, to June 30th, 1891, (unless otherwise ordered) under acts of March 3, 1873, July 12, 1876, and June 17, 1878, upon returns showing the amount and character of the service for thirty successive working days, commencing Sept. 23, 1890, at the rate of $1,178.19 per annum, being $132.53 per mile for 8.89 miles, extension.

7 This adjustment is subject to future orders and to fines and deductions.

Very respectfully, J. LOWRIE BELL,
Second Ass't Postmaster-General.

Mr. W. G. Collins, gen. supt. Milwaukee and Northern R. R., Milwaukee, Wis."

And the petitioner avers that, prior to the issuance of the notice of adjustment of pay, dated December 1st, 1890, as aforesaid, the mails had been weighed on the line of the Milwaukee & Northern

railroad as aforesaid, being on and along the route aforesaid from Milwaukee to Champion, such weighing having been made pursuant to an order of the department, notice of which was issued to the Milwaukee and Northern Railroad Company, dated August 27th, 1890, as follows:

"The general superintendent railway mail service has been directed to weigh the mails on your road, route No. 139,016, between Milwaukee and Champion, Michigan, for thirty successive days, commencing September 23d, 1890, for the purpose of obtaining *data* upon which to adjust the pay in accordance with the acts of Congress governing the same, from February 24, 1890, on extension from Republic to Champion."

That such order for the weighing the mails, and such weighing thereof, was under and pursuant to the acts of Congress, especially the act of March 3, 1873, and March 3, 1875, as found in section 4002, Revised Statutes, as follows:

"The Postmaster-General is authorized and directed to re-adjust the compensation hereafter to be paid for the transportation
8 of mails on railroad routes upon the conditions and at the rates hereinafter mentioned:

First. That the mails shall be conveyed with due frequency and speed; and that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for route-agents to accompany and distribute the mails.

Second. That the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars; and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working-days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster-General may direct."

That this statute aforesaid, except as modified or supplemented by the first section of the act of March 3, 1875, July 12, 1876, and the first section of the act of June 17, 1878, was in full force and effect during the years mentioned in this petition, and that all lawful acts done by the Post Office Department in relation to the business, matters and things in this petition mentioned, were done under and in pursuance of section 4002, Revised Statutes, and of the acts of Congress in modification thereof or supplemental thereto.

The petitioner avers that the mails so weighed on the route
9 aforesaid, pursuant to such order of August 7th, 1890, were from Milwaukee to Champion, they being then the terminals of the system operated by the Milwaukee & Northern Railroad Company, and such weighing showed a daily average of 2,363 pounds of mail carried over the entire route between Milwaukee and Champion, and that the average weight of mails carried over that part of the route between Republic and Champion was but 940 pounds.

III.

That immediately thereupon and in pursuance of said order, the Milwaukee and Northern Railroad Company entered upon the work of carrying the mails over said route so as aforesaid established between Milwaukee and Champion, and fully and faithfully performed the services required by said order, and the requirements of the Post Office Department, and the acts of Congress, and thereby became entitled to the full compensation allowed it by said order of December 1st, 1890, to-wit, $36,200.56.

IV.

That the United States, instead of paying said railroad company the full amount of money to which it was entitled for the services rendered as aforesaid, only paid it at the rate of compensation fixed by said order, to-wit, $132.53 per mile for 8.89 miles, being the extension from Republic to Champion only, and refused to pay it any sum beyond the sum of $86.35 per mile for the mileage between Milwaukee and Republic, leaving a balance due and unpaid of $9,101.08.

10 V.

That subsequently, and after said service had been fully performed, and the full amount fixed by said order of December 1st, 1890, had been earned, and the payment thereof had been refused, as aforesaid, the Milwaukee & Northern Railroad Company presented a claim to said Post Office Department for the payment of the balance due, to-wit, the sum of $9,101.08, for the services so as aforesaid rendered, but said department rejected said claim, and declined to allow it for the alleged reason that after the rate of compensation had been fixed for the carrying of the mails between Milwaukee and Champion, as aforesaid, an order was made on the third day of December, 1890, as aforesaid, fixing the rate of compensation between said Republic and Champion at the rate of $1,178.19 per annum, being at the rate of $132.53 per mile for 8.89 miles, from February 24th, 1890, to June 30th, 1891, the department claiming that said last named order was a correction of the order of December 1st, 1890, which fixed the rate at $132.53 per mile for the entire distance between Milwaukee and Champion. But your petitioner insists that there is no warrant for this contention, and alleges that

under the uniform practice and usage of the Post Office Department for many years, whenever postal service is established on an extension of a line of railroad, and a weighing of the mail is had on the entire route for the purpose of ascertaining the rate of compensation, such compensation is fixed for the entire route, and not on the extension alone.

The petitioner avers that such was the practice of the Post Office Department for the fiscal year beginning July 1, 1890, and ending June 30, 1891, as shown by the report of the Postmaster-General for that fiscal year.

11 The following are all of the routes shown by the report of the Postmaster-General for the fiscal year ended June 30, 1891, upon which mails were weighed on account of extension, with the exception of those upon which the pay was $42.75 per mile per annum, and which was not changed by re-adjustment:

No. of route.	Extension, miles.	Total length, miles.	Old pay per mile.	Readjusted pay per mile.
101018	6.53	41.72	$64.95	$70.97
104034	8.57	16.44	45.32	64.13
107109	17.72	24.13	47.88	179.55
110152	22.38	32.27	42.75	70.11
114040	25.00	69.48	44.46	53.01
114144	53.64	116.10	52.16	53.87
121050	65.00	175.08	42.75	64.98
121058	153.34	306.74	44.46	87.21
122019	22.60	85.62	34.88	52.67
126005	168.06	292.89	68.40	82.08
126022	11.80	44.41	44.46	70.11
126025	50.07	75.70	45.32	74.39
129033	43.73	67.42	42.75	55.58
129037	16.11	47.54	48.74	70.97
131079	3.00	8.57	42.75	43.61
131091	28.47	72.49	48.73	61.56
133013	40.21	225.77	67.54	77.81
133023	70.45	159.08	78.66	99.18
150057	45.47	176.46	66.69	82.94
150062	72.91	86.67	42.75	44.46
153005	82.21	166.15	56.43	62.42
155059	34.25	155.43	59.00	55.58
155101	38.89	71.59	53.01	54.72
165015	54.80	75.01	42.75	131.67
171024	23.80	50.72	42.75	86.36

The compensation for all was readjusted over the entire line, i
one case resulting in a decrease, as is above shown.

And the petitioner further avers that such was the practic
of the department not only in the fiscal year endin
12 June 30, 1891, but in previous and in subsequent years, an
that under such practice, when mails were to be weighed a
times other than at the quadrennial weighing, for the purpose o
ascertaining the compensation on a railroad route, the compensatio
of the entire route was increased or decreased in accordance wit
the results of said weighings, the re-adjustment of the compensatio
to date from the time such weighing commenced, and that thi
practice was carried out in the weighing of mails in 1885, when th
compensation of said route No. 139,016 was reduced from $107.7
per mile per annum, to $88.07 per mile per annum, this weighin
being made in the middle of the contract term.

And the petitioner further avers that, for many years, it has bee
the practice of the Post Office Department to order a general weigh
ing of the mails every four years, called the quadrennial weighing
and to order special weighings at other times in the interim whe
necessary to fix the compensation on the routes extended, or whe
required by special contracts.

In determining the compensation for carrying the mails on a
extension of a mail route, the practice of the department, as afor
said, has been to order a weighing of the mails on the whole lin
within a reasonable time after the date service was ordered on th
extension, adjusting the compensation on the whole line from th
date the weighing commenced, and on the extension from the dat
service was authorized, based upon the weights carried, except whe
such weighing occurs at the time of the regular quadrennial weigh
ing, when the pay over the whole line is adjusted from the first da
of the next July, and such has been the practice on and with th
Milwaukee & Northern railroad. The following are instances o
such practice.

13 1. Compensation on route 25016 (new No. 139016), Mi
waukee to Green Bay, from August 1st, 1882, to June 30th
1883, was fixed at $99.18 per mile. Under the regular quadrennia
weighing commencing April 4th, 1883, the compensation on th
extension from Green Bay to Stiles was fixed at $107.73 per mil
from August 15th, 1882,—the date the service was authorized—an
on the whole line from July 1st, 1883, at the same rate, and this ra
of compensation was paid up to April 15th, 1884.

2. Service on extension from Stiles to Lena was authorized Apr
2nd, 1883, and from Lena to Dickinson May 7th, 1883, and fro
Dickinson to Crivitz October 10th, 1883. A special weighing of th
mail on the whole line between Milwaukee and Crivitz was ordere
and had, commencing April 16th, 1884, and the compensation wa
fixed on the several extensions above named at $94.91 per mil
commencing in each case from the date the service was authorize
thereon up to April 15th, 1884, and the compensation on the who

line, between Milwaukee to Crivitz, was fixed at $94.91 per mile, from April 16th, 1884, the date the weighing commenced, and this rate of compensation was paid up to March 17th, 1885.

3. Service was authorized on an extension from Crivitz to Pike, February 9th, 1885, and a special weighing was ordered and had commencing March 18th, 1885, fixing the compensation on said extension from February 9th, 1885,—the date the service was authorized,—to March 17th, 1885, at $88.07 per mile, and on the whole line from Milwaukee to Pike at $88.07 per mile, from March 18th, 1885, the date the weighing commenced, up to June 30th, 1887.

14 4. Service was authorized on an extension from Pike to Iron Mountain, December 1st, 1886, and at the regular quadrennial weighing commencing March 30th, 1887, compensation on said extension was fixed at $88.92 per mile from December 1st, 1886,—the date the service was authorized—to June 30th, 1887, and on the whole line from Milwaukee to Iron Mountain at $88.92 per mile, from July 1st, 1887, and this rate of compensation was paid up to March 18th, 1888.

5. Service was authorized on an extension from Iron Mountain to Republic, February 27th, 1888, and a special weighing was ordered and had, commencing March 19th, 1888, under which the compensation on said extension was fixed at $86.35 per mile from February 27th, 1888,—the date the service was authorized—to March 19th, 1888, and on the whole line from Milwaukee to Republic at $86.35 per mile, from March 19th, 1888, the date the weighing commenced.

Your petitioner avers that the general practice of the department with the railroads of the country as above stated, and the practice of the department with the Milwaukee and Northern Railroad Company, as aforesaid, are in harmony with its contention and contrary to the action of the department in the particular matter out of which this action grows.

Wherefore, your petitioner claims and avers that the Milwaukee & Northern Railroad Company was justly entitled to the full amount of the compensation fixed and allowed by said order of December 1st, 1890, to-wit, $36,200.56, and that the payment of the balance due, to-wit, the sum of $9,101.08, has been and is wrongfully and unjustly withheld.

15 VI.

Your petitioner further avers that on the 30th day of September, 1890, it became the purchaser, and thereupon it became the lawful owner by assignment and transfer, of all of the capital stock of the said Milwaukee & Northern Railroad Company; that on the 1st day of October, 1890, the board of directors of the Milwaukee & Northern Railroad Company was reorganized by the election of persons who were either directors or officers of the petitioner, and the offices were filled by the election of persons who were officers of its company, with the solitary exception of the president of the Milwaukee & Northern Railroad Company; that from the 30th day of

September, 1890, until the 26th day of June, 1893, that company operated the railroad as a separate organization and in the name of the Milwaukee & Northern Railroad Company; that on the 26th day of June, 1893, pursuant to a vote of the stockholders of the Milwaukee & Northern Railroad Company, the latter company executed a deed to the petitioner, whereby it conveyed to petitioner all its railroads, railways, rights of way, depot grants, tracks, bridges, etc., and also all other property and choses in action whatsoever, both real and personal, of the said Milwaukee & Northern Railroad Company, and all its rights, privileges, and corporate franchises connected with or relating to such railroad or to the construction, maintenance, use or operation of the same. And that thereafter, to-wit, August 28, 1893, the Milwaukee & Northern Railroad Company held its last stockholders' meeting and its last directors' meeting, and since that time it has not exercised any corporate functions or powers, nor has it pretended to do anything of the sort. Your petitioner avers that by reason of the premises it has been the owner of the claim in suit ever since June 26, 1893, and is now the owner of the foregoing claim, no part thereof having been assigned or transferred by the petitioner in any way, and that it is entitled to receive payment thereof. Your petitioner further avers that it has not waived or relinquished its right to demand, sue, and recover from the United States the said amount of $9,101.08, so wrongfully withheld by the Postmaster General aforesaid.

Wherefore your petitioner prays judgment for the sum of nine thousand one hundred and one dollars and eight cents ($9,101.08).

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
By A. J. EARLING, *Its President.*

GEORGE R. PECK,
515 *Old Colony Building, Chicago, Ill.,*
DUDLEY & MICHENER,
Washington, D. C.,
Attorneys for said Petitioner.

STATE OF ILLINOIS, } ss:
County of Cook, }

A. J. Earling, being duly sworn, deposes and says that he is an officer of the above named petitioner, The Chicago, Milwaukee & St. Paul Railway Company, to-wit, its president, and that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, and that said petitioner is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and he is informed and believes that the facts stated in said petition are true.

A. J. EARLING.

Subscribed and sworn to before me this 16th day of July, A. D. 1900.

[SEAL.]

W. D. MILLARD,
Notary Public, Cook County, Illinois.

16 II.—*Demurrer to Amended Petition.*

Filed December 14, 1903.

Comes now the defendant, The United States, by its Attorney General and demurs to the amended petition, filed in the above entitled action July 19, 1900, for the following reasons:

First. Because it appears that the claim therein presented has come to the claimant, if at all, by a pretended assignment which, as to the United States, is void.

Second. Because the allegations set forth in said amended petition do not state facts sufficient to constitute a cause of action in favor of the claimant and against the United States.

L. A. PRADT,
Assistant Attorney General.

Filed December 14, 1903.

17 III.—*Argument and Submission on Demurrer.*

At a Court of Claims held January 11, 1904.

This case was argued and submitted on demurrer.

IV.—*Judgment of the Court.*

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY Company
v.
UNITED STATES. } No. 20462.

At a Court of Claims held January 18, 1904, the demurrer of the defendants to the amended petition of the claimant was sustained and it was ordered that the said amended petition of the claimant, The Chicago, Milwaukee and St. Paul Railway Company be dismissed.

BY THE COURT.

18 V.—*Application for and Allowance of Appeal.*

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY Company
v.
UNITED STATES. } No. 20462.

Comes now the petitioner and prays the court to grant an appeal to the Supreme Court of the United States from the decision and

judgment of this court in sustaining the demurrer and dismissing the petition in this case.

DUDLEY AND MICHENER,
Attorneys for the Petitioner.

Filed February 9, 1904.

Ordered that the appeal in said cause be allowed as prayed for.

BY THE COURT.

February 9, 1904.

19 In the Court of Claims.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY Company
v.
THE UNITED STATES. } No. 20462.

I, John Randolph assistant clerk of the Court of Claims certify that the foregoing are true transcripts of pleadings in the above entitled cause,—of the judgment of the court dismissing petition on demurrer,—of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 15th day of February, A. D. 1904.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 19,254. Court of Claims. Term No. 603. The Chicago, Milwaukee and St. Paul Railway Company, appellant, *vs.* The United States. Filed February 29", 1904. File No. 19,254.